

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ALLSTATE INSURANCE COMPANY,

3:15-CV-01766-BR

Plaintiff,

OPINION AND ORDER

v.

HECTOR CEPEDA, PILAR WRIGHT,
and ROSALIE DALZELL,

Defendants.

DOUGLAS F. FOLEY

VERNON S. FINLEY

Douglas Foley & Associates, PLLC
13115 N.E. 4th Street
Suite 260
Vancouver, WA 98684
(360) 883-0636

Attorneys for Plaintiff

Moloy K. Good
Good Law Clinic, PLLC
211 E. 11th Street, Suite 104
Vancouver, WA 98660
360-608-5346

Attorneys for Defendants

BROWN, Judge.

This matter comes before the Court on Plaintiff Allstate Insurance Company's Motion (#15) for Summary Judgment. For the reasons that follow, the Court **GRANTS** Allstate's Motion and **DISMISSES** this matter **with prejudice**.

BACKGROUND

Defendant Rosalie Dalzell is the owner and operator of a rental unit located at 3823 N. Overlook, Portland, Oregon (the Unit).

On October 9, 2011, Dalzell obtained a Homeowners Insurance Policy from Plaintiff Allstate Insurance Company related to the Unit.

In March 2012 Defendants Hector Cepeda and Pilar Wright submitted an application to rent the Unit through Performance Properties, a rental management company. On March 13, 2012, Cepeda and Wright's rental application was accepted. At some point Cepeda and Wright agreed to rent the Unit, and they signed a one-year lease to begin April 22, 2012.

On May 9, 2012, Cepeda drove to the Unit from Los Angeles to drop off "some . . . belongings" before Cepeda and Wright moved into the Unit later in May. On May 9, 2012, Cepeda met Dalzell for the first time. Cepeda spent the day on May 9, 2012, unloading his belongings into the Unit and stayed overnight in

the Unit.

On May 10, 2012, Cepeda drove back to Los Angeles.

On May 17, 2012, Cepeda and Wright received a call from Performance Properties advising them that Dalzell no longer wanted to rent the Unit to Cepeda and Wright. According to Cepeda and Wright, Dalzell accused Cepeda of reversing a deadbolt lock on the Unit that caused Cepeda to have access to the attic. Performance Properties advised Cepeda and Wright that Dalzell had moved all of their belongings into the garage, had changed the locks on the Unit, and "had tried to file a police report" regarding the allegedly reversed deadbolt.

Ultimately Cepeda and Wright had to find another place to live.

On April 3, 2015, Cepeda and Wright filed an action in Multnomah County Circuit Court against Dalzell in which they alleged (1) Dalzell refused to rent the Unit to Cepeda and Wright because of their national origin in violation of Oregon Revised Statute § 659A.421 ; (2) Dalzell refused to rent the Unit to Cepeda and Wright because they have two sons, ages 8 and 11, in

violation of Oregon Revised Statute § 659A.421; and (3) Dalzell¹ was negligent when she failed in her "duty to use reasonable or ordinary care to avoid violating" Oregon Revised Statute § 659A.421 and/or when she failed to "hire, supervise and train her agents and employees who were charged with ensuring compliance with" Oregon Revised Statute § 659A.421.

At some point Dalzell tendered defense of Cepeda and Wright's state-court action to Allstate pursuant to Dalzell's Homeowners Policy.

On September 18, 2015, Allstate filed a Complaint for Declaratory Relief in this Court in which Allstate seeks a declaration that it does not have a duty to defend or to indemnify Dalzell in the underlying action.

On January 5, 2016, Allstate filed a Motion for Summary Judgment as to both the duty to defend and the duty to indemnify. The Court took Allstate's Motion under advisement on February 18, 2016.

¹ In their state-court complaint Cepeda and Wright assert their negligence claim against "Defendant Bostik and Defendant Contractor." Those Defendants are not in the case caption, there are not any allegations against either of them in the complaint, and the facts underlying Cepeda and Wright's negligence claim do not involve anyone but Dalzell. The Court, therefore, assumes Plaintiffs' assertion of the negligence claim against "Defendant Bostik and Defendant Contractor" is a typographical error, and the Court analyzes this claim as asserted against Dalzell.

DISCUSSION

Allstate seeks summary judgment on the ground that discrimination in the rental of property is an intentional act, and, therefore, it is not an occurrence under the policy. In addition, or in the alternative, Allstate asserts the actions of Dalzell alleged in the state-court complaint are excluded from coverage by the Intentional Acts Exclusion in Dalzell's policy. Allstate, therefore, seeks a declaration that it is not obligated to defend or to indemnify Dalzell and requests the Court to issue an order permitting Allstate to withdraw from the defense of Dalzell in the underlying action.

Dalzell asserts Cepeda and Wright do not allege any "intent to harm" in their state-court complaint. According to Dalzell, therefore, Cepeda and Wright's claims allege an occurrence under the policy and are not excluded from coverage by the Intentional Acts Exclusion. Thus, Dalzell asserts Allstate is not relieved from the obligation to defend or to indemnify Dalzell in the underlying action.

I. Insurance Contract Interpretation

Under Oregon law the construction of a contract is a question of law for the court. *Holloway v. Republic Indem. Co. of Am.*, 341 Or. 642, 649 (2006) (citing *Hoffman Const. Co. of Alaska v. Fred S. James & Co. of Ore.*, 313 Or. 464, 470 (1992)). The Court's task is to "ascertain the intention of the parties to

the insurance policy." *Id.* at 649-50 (citing Or. Rev. Stat. § 742.016). The Court accomplishes this task "based on the terms and conditions of the insurance policy." *Id.*

"If an insurance policy explicitly defines the phrase in question, [the Court] appl[ies] that definition." *Id.* at 650. See also *Joseph Educ. Ass'n v. Joseph Sch. Dist. No. 6*, 180 Or. App. 461, 467 (2002).

If the policy does not define the phrase in question, [the Court] resort[s] to various aids of interpretation to discern the parties' intended meaning. Under that interpretive framework, we first consider whether the phrase in question has a plain meaning, *i.e.*, whether it is susceptible to only one plausible interpretation. If the phrase in question has a plain meaning, we will apply that meaning and conduct no further analysis. If the phrase in question has more than one plausible interpretation, we will proceed to the second interpretive aid. That is, we examine the phrase in light of 'the particular context in which that [phrase] is used in the policy and the broader context of the policy as a whole. If the ambiguity remains after the court has engaged in those analytical exercises, then any reasonable doubt as to the intended meaning of such [a] term[] will be resolved against the insurance company. However, . . . a term is ambiguous . . . only if two or more plausible interpretations of that term withstand scrutiny, *i.e.*, continue[] to be reasonable despite our resort to the interpretive aids outlined above.

Id.

When "evaluating whether an insurer has a duty to defend[,]" the court looks only at the facts alleged in the complaint" and the terms of the policy. *Ledford v. Gutoski*, 319 Or. 397, 400 (1994). See also *Nat'l Union Fire Ins. Co. of Pittsburgh v.*

Starplex Corp., 220 Or. App. 560, 573 (2008) ("whether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy.").

The duty to indemnify "is independent of the duty to defend." *Ledford*, 319 Or. at 403 (citation omitted). "Even when an insurer does not have a duty to defend based on the allegations in the initial complaint, the facts proved at trial on which liability is established may give rise to a duty to indemnify if the insured's conduct is covered." *Id.* (citation omitted). "In order for summary judgment to be appropriate on the duty to indemnify, there must be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law." *Id.* (citations omitted).

II. Insurance Policy Language

Dalzell's insurance policy with Allstate provides in pertinent part:

Section II - Family Liability and Guest Medical Protection

Coverage X Family Liability Protection

Losses We Cover Under Coverage X:

Subject to the terms, conditions and limitations of this policy, **Allstate** will pay damages which an **insured person** becomes legally obligated to pay because of **bodily injury** or **property damage** arising from an **occurrence** to which this policy

applies, and is covered by this part of the policy.

Compl., Ex. 2 at 34 (emphasis in original). The policy also provides the following limitation of coverage:

Losses We Do Not Cover under Coverage X:

1. We do not cover any **bodily injury** or **property damage** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person**. This exclusion applies even if:
 - a) such **insured person** lacks the mental capacity to govern his or her conduct;
 - b) such **bodily injury** or **property damage** is of a different kind or degree than intended or reasonably expected; or
 - c) such **bodily injury** or **property damage** is sustained by a different person than intended or reasonably expected.

This exclusion applies regardless of whether or not such **insured person** is actually charged with, or convicted of a crime.

Id (emphasis in original). The policy contains the following definitions:

4. **"Bodily injury"** - means physical harm to the body, including sickness or disease, and resulting death, except that **bodily injury** does not include:
 - a) any venereal disease;
 - b) Herpes;
 - c) Acquired Immune Deficiency Syndrome (AIDS);
 - d) AIDS Related Complex (ARC);
 - e) Human Immunodeficiency Virus (HIV); or any resulting symptom, effect, condition, disease or illness related to (a) through (e) listed above.

* * *

9. **"Occurrence"** - means an accident, including continuous or repeated exposure to substantially the same general harmful conditions during the policy period, resulting in **bodily injury** or **property damage**.
10. **"Property damage"** - means physical injury to or destruction of tangible property, including loss of its use resulting from such physical injury or destruction.

Compl., Ex. 2 at 17-18 (emphasis in original).

III. Duty to Defend

As noted, "[w]hether an insurer has a duty to defend an action against its insured depends on two documents: the complaint and the insurance policy." *Starplex Corp.*, 220 Or. App. at 573. Cepeda and Wright allege three claims in their complaint: two for discrimination in violation of Oregon Revised Statute § 659A.421 and one claim for negligence.

A. Cepeda and Wright's First and Second Claims for Housing Discrimination in Violation of § 659A.421

As noted, Cepeda and Wright do not specifically allege in their First and Second Claims for violation of § 659A.421 that Dalzell intended to cause them harm when she allegedly refused to rent the premises to them because of either their national origin or their familial status. The Oregon Supreme Court, however, has recognized the nature of certain acts necessarily gives rise to a mandatory inference that there was the intent to harm. See *Nielsen v. St. Paul Co.*, 283 Or. 277, 281 (1978) ("There are some

intentional acts the nature of which is such that it must necessarily be concluded that there was an intention to injure."). In addition, the Oregon Court of Appeals has held when the intent to injure is inferred, the insured's conduct is not an "accident" or "occurrence" under a liability policy. See *Falkenstein's Meat Co. v. Maryland Cas. Co.*, 91 Or. App. 276, 279-80 (1988).

In *Falkenstein's Meat* an employee sued the insured alleging the insured company changed the employee's job position and reduced his hours of work in retaliation for his complaints that the insured "was not providing a safe place of employment and that the vehicle which he was assigned to operate was unsafe." 91 Or. App. at 278. The insured tendered defense of the employee's action to its insurance company. The insurance company refused to defend on the ground that the alleged conduct by the insured was not an occurrence and was specifically exempt from coverage under an intentional-acts exclusion. *Id.* The insured brought a declaratory judgment action "to determine whether [the insurance company] had a duty to defend" the employee's action. The insured asserted the employee's complaint "involve[d] an occurrence" within the meaning of the policy because the complaint did not allege the insured "intended the harm which occurred as a result of the conduct." *Id.* at 279. The insurance company, in turn, asserted the allegation of

retaliation by the employer "involve[d] intentional rather than accidental conduct and, therefore, [was] not within the policy definition of 'occurrence.'" *Id.* The Oregon Court of Appeals concluded plaintiff's complaint did "not allege a specific type of intentional harm. However, retaliatory and discriminatory conduct pursuant to [Oregon's Whistleblower statute,] ORS 654.062(5)(a)[,] are acts from which an intention to cause harm must necessarily be inferred." *Id.* at 280. The court, therefore, concluded the conduct alleged in the employee's complaint was not an "occurrence," and, therefore, the insurer did not have a duty to defend the employer. *Id.*

In *Groshong. v. Mutual of Enumclaw Insurance Company*, 143 Or. App. 450 (1996), the court examined the holding of *Falkenstein's Meat* in the context of a claim for housing discrimination based on familial status in violation of the Fair Housing Act (FHA), 42 U.S.C. § 3601. Specifically, the plaintiff in the underlying FHA action alleged she inquired about renting a second-floor apartment in an apartment complex owned by the insured. The apartment manager informed the plaintiff that the apartment complex "did not allow small children on the second floor because of safety concerns." *Id.* at 452. As a result, the plaintiff was unable to rent a unit in the apartment complex. The United States Department of Justice brought an action on behalf of the plaintiff against the apartment-complex owner for

housing discrimination in violation of the FHA. The apartment-complex owner tendered defense of the action to his insurance company. The insurance company, however, declined to defend the apartment-complex owner. The apartment-complex owner entered into a settlement and consent order with the Department of Justice and the plaintiff. The insurance company declined to indemnify the apartment-complex owner. The apartment-complex owner then filed an action against his insurance company asserting the company had breached its insurance contract by failing to defend and to indemnify the apartment-complex owner. The insurance company asserted it had declined to defend and to indemnify the apartment-complex owner on the ground that, among other things, it "would be against public policy to provide insurance coverage for a claim of intentional housing discrimination." *Id.* at 454. The trial court entered a judgment for the insurance company on other grounds, and the apartment-complex owner appealed. The Oregon Court of Appeals affirmed the judgment for the insurance company and concluded Oregon public policy "preclude[d] insurance coverage" for the discrimination claim. *Id.* The Court of Appeals noted Oregon's frequently reiterated policies that "[i]nsurance coverage for the protection of one who intentionally inflicts injury upon another is against public policy," and "[t]here are some intentional acts the nature of which is such that it must necessarily be concluded that there

was an intention to injure." *Id.* at 457 (quotations omitted). The court noted it had previously concluded "disparate treatment" discrimination claims like the claim at issue in *Groshong* "necessarily allege[] intentional injury," and, therefore, disparate-treatment discrimination claims did not fall within an insurance policy's express coverage for "any negligent act, error or omission of the insured." *Id.* (quotation omitted). The court noted it had not, however, resolved "whether intentional discrimination would be uninsurable as a matter of policy." *Id.* at 458 (quotation omitted). The court then

reach[ed] the question expressly reserved in *School District No. 1* and conclude[d] that public policy precludes insurance coverage of claims alleging "disparate treatment" discrimination. Such discrimination necessarily implicates an intention to injure. As we noted in *School District No. 1*, such discrimination "means treating an individual less favorably *because*" of some legally protected status. 58 Or. App. at 701 (emphasis in original). *Falkenstein's Meat Co. v. Maryland Casualty Co.*, 91 Or. App. 276, 280 (1988), is instructive. There, we held that a claim that the insured employer had engaged in retaliatory and discriminatory conduct against an employee in violation of ORS 654.062(5)(a), the occupational safety "whistle blower" statute, was not covered under the terms of the employer's comprehensive general liability insurance policy. We so concluded despite the fact that the employee's complaint did not explicitly allege that the employer intended the harm that occurred as a result of the discriminatory conduct.

* * *

The same is true of a claim of "disparate treatment" housing discrimination. The "natural and intended consequence" of such discrimination

is to "cause some type of harm" to the putative renter or purchaser based on his or her legally protected status. Such a claim alleges conduct "from which an intention to cause harm must necessarily be inferred." *Id.* Thus, public policy precludes insurance coverage of such claims.

Id. at 458-59. Although *Groshong* involved a claim of housing discrimination based on familial relations under the FHA, the court's holding in *Groshong* is equally applicable to the claims of Cepeda and Wright for housing discrimination based on national origin or familial relations in violation of § 659A.421. See *McGary v. City of Portland*, 386 F.3d 1259, 1270-71 (9th Cir. 2004) (Section 659A.421 should be interpreted "in the same manner as [its] federal counterpart," the FHA). In their First and Second Claims Cepeda and Wright allege conduct from which an intention to cause harm must be inferred because the "natural and intended consequence" of such discrimination is to cause some type of harm to the putative renter. The Court, therefore, concludes public policy precludes a duty to defend those claims.

B. Negligence Claim of Cepeda and Wright

Dalzell asserts Allstate has a duty to defend in this matter because Cepeda and Wright also allege a claim for negligence, which, by definition, is not an intentional tort and, therefore, may be an occurrence under the policy and/or is not excluded by the Intentional Acts Exclusion.

In their negligence claim Cepeda and Wright allege in

pertinent part that

[Dalzell] had a duty to operate her affairs in a manner free from unlawful discrimination.

[Dalzell] further had a duty to hire, train, supervise and discipline her employees or agents in a fashion that assures compliance with state laws.

[Dalzell] had a duty to use reasonable or ordinary care to avoid violating Plaintiffs right to rent a dwelling unit free from discrimination.

[Dalzell] breached her duties to Plaintiffs by refusing to rent to them in violation of their rights. [Dalzell] further breached her duties to Plaintiffs by failing to hire, supervise and train her agents and employees who were charged with insuring compliance with Plaintiffs' rights.

[Dalzell] created a foreseeable risk of harm to Plaintiffs through, among other things, by refusing to rent to Plaintiffs due to their national origin and familial status.

Compl., Ex. A at 9-10. Dalzell asserts courts have held violations of the FHA do not require discriminatory intent, and, in any event, Cepeda and Wright have not alleged any intent in their negligence claim. According to Dalzell, therefore, in their Third Claim for negligence Cepeda and Wright allege an "occurrence" under the policy, and, thus, coverage is not excluded under the Intentional Acts Exclusion.

The Ninth Circuit has repeatedly held FHA claims alleging disparate-treatment discrimination in housing such as those at issue here require a "showing of discriminatory intent."

Massbaum v. WNC Mgmt, 361 F. App'x 904, 905 (9th Cir. 2010)

(citing *McDonald v. Coldwell Banker*, 543 F.3d 498, 505 n.7 (9th

Cir. 2008)). See also *Green v. Ca. Court Apartments, LLC*, 321 F. App'x 589, 591 (9th Cir. 2009). That same element is required for a claim of disparate-treatment discrimination under § 659A.421 and Oregon does not recognize a claim for negligent discrimination in housing.

Even though Cepeda and Wright couch their Third Claim in the rubric of negligence, they are, in fact, asserting a claim for discrimination in housing under § 659A.421. The Oregon Supreme Court has made clear that when analyzing the duty to defend, "a court's focus should be on the conduct" alleged in the claim rather than the label given to the claim. See, e.g., *Ledford*, 319 Or. 397. Here Cepeda and Wright allege Dalzell had a duty to "abide by § 649A.421" and to avoid violating that statute and Dalzell created the risk of harm by refusing to rent to Cepeda and Wright due to their national origin and/or familial status. Under the cloak of negligence Cepeda and Wright's Third Claim is, in fact, one for violation of § 659A.421, and, as with their First and Second Claims, the Court must infer an intent to discriminate. The Court, therefore, concludes public policy also precludes a duty to defend as to the Third Claim of Cepeda and Wright.

Accordingly, the Court grants Allstate's Motion for Summary Judgment as to the issue of the duty to defend, declares Allstate is not obligated to defend Dalzell in the underlying

action, and declares Allstate may withdraw from the defense of Dalzell in the underlying action.

IV. Duty to Indemnify

Allstate also moves for summary judgment as to its alleged duty to indemnify Dalzell in the underlying action. As noted, the duty to indemnify "is independent of the duty to defend." *Ledford*, 319 Or. at 403 (citation omitted). "Even when an insurer does not have a duty to defend based on the allegations in the initial complaint, the facts proved at trial on which liability is established may give rise to a duty to indemnify if the insured's conduct is covered." *Id.* (citation omitted). "In order for summary judgment to be appropriate on the duty to indemnify, there must be no genuine issue of material fact, and the moving party must be entitled to judgment as a matter of law." *Id.* (citations omitted).

As noted, in *Groshong* the Oregon Court of Appeals also addressed whether the insurer had a duty to indemnify the apartment-complex owner against the claims of housing discrimination in violation of the FHA. The court first concluded the allegations in the complaint "facially state[d] a claim of 'disparate treatment'" even though the underlying complaint did not specifically state it was a claim for disparate treatment:

[The apartment-complex owner's] policy [of not renting second-floor apartments to families with

children] was not framed in facially neutral terms, such as refusing to rent to persons who presented safety or noise concerns. Instead, the policy was applied, without distinctions for individual circumstances, to all persons falling within a statutorily protected class. That is the essence of "disparate treatment" discrimination.

Id. at 461. The Court of Appeals then concluded: "Because public policy precludes insurance coverage of such discrimination, [the insurer] cannot be liable for failing to defend or indemnify [the apartment-complex owner] against [the underlying plaintiff's] claims." *Id.* (citing *Isenhardt v. Gen. Cas. Co. of Am.*, 233 Or. 49, 53 (1962) ("We hold that a clause in a contract of insurance purporting to indemnify the insured for damages recovered against him as a consequence of his intentional conduct in inflicting injury upon another is unenforceable by the insured on the ground that to permit recovery would be against public policy. Therefore, the insurance policy in the present case must, in effect, be regarded as excluding such coverage.")).

Cepeda and Wright allege Dalzell refused to rent the Unit to them on the basis of their national origin or familial status. As in *Groshong*, Dalzell's refusal was not "framed in facially neutral terms," but instead applied to "persons falling within a statutorily protected class." Cepeda and Wright's state-court complaint, therefore, alleges disparate-treatment housing discrimination. Thus, as in *Groshong*, the Court concludes Allstate "cannot be liable for failing to . . . indemnify"

because "public policy precludes insurance coverage of such discrimination."

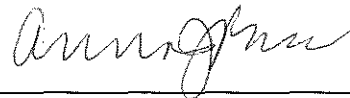
Accordingly, the Court grants Allstate's Motion for Summary Judgment as to the issue of its duty to indemnify Dalzell.

CONCLUSION

For these reasons, the Court **GRANTS** Plaintiff Allstate Insurance Company's Motion (#15) for Summary Judgment and **DISMISSES** this matter **with prejudice**.

IT IS SO ORDERED.

DATED this 6th day of May, 2016.



ANNA J. BROWN
United States District Judge